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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 66.

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER, WILLIE J. WILLIS,
Petitioners,

vs.

CITY OF BIRMINGHAM,
Respondent.

On Writ of Certiorari to the Court of Appeals of Alabama.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

STATEMENT.

As set forth in petitioners' statement (pp. 4, 5), the petitioners were all charged and convicted below for having trespassed after warning in violation of a city code provision (Sec. 1436).

While a great portion of the record in each of the cases is consumed with details concerning the respective peti-

tioners going upon the premises of the various department stores, the gravamen of the offense charged in each instance was that the petitioners remained on the premises described in the respective complaints after being warned not to do so.

Gober and Davis:

Mr. Gottlinger, Controller for Pizitz department store, testified (R. 21, 23) that he was present and heard Mr. Dick Pizitz, who was the assistant to the president of the store, converse with the two petitioners, Gober and Davis. They were told by Mr. Pizitz that they could not be served. One of petitioners made "a statement to the effect that we should call the police" (ibid); they did not leave when Mr. Pizitz asked them to leave (R. 23) and "remained until the officers came" (R. 24).

Detective C. L. Pierce testified for the City that he had a conversation with Davis and Gober the day following their arrest (R. 28). He testified he was told by one of the petitioners that both of them had attended a meeting at Rev. Shuttlesworth's house; that "volunteers were asked for and both Davis and Gober said they volunteered to participate in the sit-down demonstration and that they were assigned stores to go to at a certain time and they said they did agree" (R. 40). Both volunteered and were assigned to go to Pizitz; and that they remained there until the officers arrested them (ibid); that they "made no effort and did not intend to leave until they were arrested, and that the purpose of that thing was to stay there until they were arrested. And they stated when they sat down they were denied service there and asked to leave" (ibid).

Police Officer Martin was told by a superior officer to go to Pizitz store because of a disturbance there (R. 20).

Upon arrival at Pizuz store there were people in the store talking to his superior officers and he was ordered by his immediate superior to make the arrest (R. 20).

Petitioners did not ask the identity of the person who told them to leave (R. 45).

Hutchinson and King:

Officer Martin received a call to go to Loveman's department store (R. 107). On arrival he noticed a rope had been tied from one post to another post at the eating place with a sign on it "stating closed" (ibid). He was told by Officer J. L. Holt to go with him to Loveman's (ibid). Someone from Loveman's informed his superior officers that the two boys had been told to leave (R. 108).

A disturbance was caused because the two Negroes were sitting there (R. 113).

On three occasions the store detective announced within three feet of the petitioners that the place was closed. The manager of the cafeteria hung a sign up indicating "the place was closed" (R. 117). The petitioners remained until the police arrived, which was about five minutes later (ibid). The petitioners remained seated and all of the white people got up and left (R. 118).

Parker and West:

Mrs. Gibbs, store detective at Newberry's, identified herself to these two petitioners and "told them they would have to leave (R. 162). They said they were not leaving, that they were not violating any law" (R. 163).

Mr. Stallings, assistant store manager, told the petitioners, "You know you can't do this" (R. 164). One of them said, "Well, we have our rights" (Ibid). The petitioners kept sitting there (ibid).

Sanders and Westmoreland:

Officer Caldwell testified for the City that he had orders or received a call to go to Kress on the morning of March 31, 1960 (R. 209). He observed that the lunch room was closed and that the lights were out (ibid); he observed Westmoreland and Sanders "sitting there" (ibid); the manager of the lunch counter told the officer he had turned the lights out and closed the counter, and "that they couldn't be served" (ibid).

The manager of the luncheon counter approached the two petitioners and informed the boys that the place was closed; he put up a closed sign and told them, "we couldn't serve them and they would have to leave" (R. 211). The boys moved to another bay or area of the luncheon counter (ibid). He approached them again and said, "Boys, you will have to leave * * * the bay is closed. We are closing" (R. 212). One of the boys said, "Well, we have our rights."

The luncheon counter manager summoned the manager of the store, who "asked them to leave the store" (ibid).

Walker and Willis:

Officer Casey received a call over his radio to go to Woolworth's store (R. 252). He contacted Mrs. Evans, the manager of the lunch room counter (ibid) and she stated she "had told the boys to leave, that the place was closed", and a second time she directed her conversation to the defendants and "told them it was closed and that they would have to leave, she would not serve them" (R. 252, 253).

The officer "took the complaint from Mrs. Evans that she wanted the boys out of the store, that the lunch room was closed," and arrested them (ibid).

FACTS COMMON TO EACH CASE.

Petitioners, under this topical heading of their brief, paragraph three (p. 15), charge that "it appears" that petitioners were arrested without the request of any agent of the stores.

It might be noted at this point that **no issue was raised by petitioners' pleadings** as to how the arrests were initiated. The plea of the defendants was "not guilty" (see **Gober-Davis**, R. 10). Since the manner of the arrest was not in issue in the controversy under the pleadings, the respondent here was neither called upon nor prepared to negative this matter, which is raised for the first time in the entire proceedings before **this Court**.

In paragraph four, petitioners state that there is no evidence "that the person requesting petitioners to leave the lunch area identified himself". This, too, was not an issue in the trial below for the reason stated immediately above.

What, in fact, the petitioners are proposing in both paragraph three and four is that this Court substitute itself for the trial court and permit the petitioners to re-try the case under a different set of pleadings and issues. The matters complained of here were not injected into the trial below, nor was any assignment of error in the state appellate court predicated upon the propositions now asserted by petitioners.

SUMMARY OF ARGUMENT.

I.

Petitioners cannot retry their cases before this Court.

The only issue before the state trial court was whether or not the petitioners had trespassed as charged in the complaint filed by the respondent. Petitioners' motions to strike the complaint were held to be inapplicable. The demurrers filed in each case were overruled on the basis that each of same was too general in nature, as prohibited by Section 236 of Title 7, **Code of Alabama, 1940**. Those grounds assigning Constitutional questions were ruled to be speaking demurrers. Evidence was then taken on the issue of whether or not petitioners had committed the trespass as charged.

The alleged Section 369 of respondent's Code, which purports to require restaurant operators to construct certain partitions and entrances, was in no way involved in the controversy as charged by petitioners. Petitioners did not request the court to take judicial notice of any such ordinance, no such ordinance was identified by petitioners, no such ordinance was introduced in evidence, no exception was taken to the ruling of the trial court preventing an employee of a store from testifying as to whether he had knowledge of the ordinance, and no assignment of error before the state appellate court in any way related to the existence of such alleged ordinance. Nothing in the **pleadings** before the trial court raised any issue relevant to the alleged ordinance. As noted in **Garner v. State of Louisiana**, 82 S. Ct. 248, Mr. Chief Justice Warren emphasized that the taking of judicial notice of the ordinance would be "to turn the doctrine into a pretext for dispensing with a trial." To rule otherwise would place a burden upon the trial court of acting as counsel for the

person in whose favor an ordinance might operate, by causing it to be alert at all times to all laws and ordinances and to invoke them on any occasion where same might be of benefit to parties in litigation.

II.

The pleadings filed by petitioners in the cases before the court here, as heretofore outlined, were properly due to be overruled under both the applicable sections of the Alabama Code and the decisions of Alabama's Supreme Court interpreting the statutes.

Upon completion of the evidence in each of the cases, petitioners filed similar motions to exclude the evidence. None of the grounds of the motions to exclude the evidence attacked the sufficiency of the evidence, but instead dealt with the propositions that the various stores involved were public property or operated by the public; that thereby the stores became an arm of the state and therefore, as such, could not partially segregate themselves. The Alabama Court of Appeals ruled that, under **Browder v. Gayle**, 142 F. Supp. 707, the Fourteenth Amendment guaranteed the stores this right, and further noted that **Williams v. Howard Johnson**, 268 F. 2d 845, was authority for the fact that the stores could deny their eating facilities to members of the Negro race, where the restaurant was not a part of interstate commerce.

The petitioners emphasized repeatedly in their motions to exclude the evidence that racial discrimination "was in accordance with a policy, custom and usage" of the various stores.

Your respondent submits that in keeping with admissions of petitioners and the issues in controversy as established by the pleadings, the trial court was not in error in its conviction of petitioners.

Counsel for the petitioners conceded that the only issue involved was whether "some trespass after warning" had been committed (R. 25, 26).

III.

Respondent submits that no Constitutional rights were denied to petitioners by the state court. The Fourteenth Amendment does not reach to demonstrations conducted on private property over the objection of the owner, as noted by Mr. Justice Harlan in **Garner**, supra.

The actions of the petitioners in the various stores did not encompass the question of free speech. Their actions, as shown by the record, clearly indicate that they sought only one objective, namely, that of being arrested in order to precipitate litigation over the question of the **custom and policy of the various stores.** The privilege of resort to litigation was fully accorded petitioners.

ARGUMENT.

I.

STATUTORY PROVISIONS INVOLVED.

It is contended by petitioners that "Section 369 (1944)" of the respondent's city code is involved in the case now before the Court.

The alleged ordinance requires a restaurant operator to maintain certain partitions and entrances for white and colored persons in eating establishments (pp. 2, 10).

Assuming such to be true, the propriety of suggesting the ordinance for the **first time** in this Court is completely out of harmony with past decisions of this Court. In the case of **Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri**, 80 S. Ct. 391, 361 U. S. 363, 4 L. Ed. 2d 373, this Court said, "Constitutional questions will not be dealt with abstractly. * * * They will be dealt with only as they are appropriately raised upon a record before us. * * * Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress." The foregoing quote was adopted from the earlier decision of this Court in **Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board**, 315 U. S. 740, at page 746, 62 S. Ct. 820, at page 824, 86 L. Ed. 1154.

The record before this Court clearly shows that petitioners have never placed in issue before the **state courts** the matter of any such ordinance requiring separation of the races, nor addressed themselves to the question in any manner before the state appellate court.

Petitioners argue here, but never below, that an Alabama statute requires that ordinances of the City of Bir-

mingham be judicially recognized (p. 23*). Respondent agrees that its ordinances are judicially noticeable, but only in appropriate instances.

Bearing in mind that **judicial notice is a rule of evidence** rather than a **rule of pleading, Gulf, M. & N. R. Co. v. Weldy**, 8 So. 2d 249, 193 Miss. 59, 144 A. L. R. 936, the suggested ordinance, to have served some defensive purpose (see **Code of Alabama (1940), Title 7, Section 225**) would of necessity have had to be incorporated into a plea or answer to the complaint. If then, after the supposed ordinance was properly made an issue in the trial below petitioners sought judicial notice by the Court, rules of **evidence** making it unnecessary to prove by evidence the existence of such an ordinance, would have been entirely applicable. The record before the Court clearly demonstrates, of course, that petitioners did not place the question of such ordinance before the lower court, nor was any **assignment of error** directed to the proposition before the state appellate court (R. 41, 42).

This question is not a new one for this Court. In the recent case of **Garner v. State of Louisiana**, 82 S. Ct. 248 (1961), Mr. Chief Justice Warren, in delivering this Court's opinion, stated, "There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by respondent * * * would be 'to turn the doctrine into a pretext for dispensing with a trial' ", citing **Ohio Bell Telephone Co. v. Public Utilities Commission**, 301 U. S. 292, 302, 57 S. Ct. 724, 729, 81 L. Ed. 1093. The foregoing opinion further recited the inherent danger of a court taking upon itself the prerogative of unsolicited judicial notice in the absence of inserting same into the record by saying a party, "* * * is deprived of an opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon."

In light of the **Garner opinion**, supra, and in light of the fact that the record discloses nowhere that the court below, either upon solicitation of counsel or otherwise, took or refused to take judicial notice of any such ordinance, and, further, that no assignment of error before the state appellate court made any reference whatever to the existence of such an ordinance, thereby affording the state appellate court an opportunity to rule on any question relating to the validity of the ordinance, your respondent respectfully urges that no constitutional or other questions dependent upon such an ordinance are properly before this Court for review. To rule otherwise would completely dispense with the need for filing pleadings since the Court would be required, under petitioners' theory, to at all times be alert to every ordinance of the City of Birmingham and to place them in issue whenever same might be applicable, thereby placing the burden upon the Court to, in effect **act as counsel** for the person in whose favor the ordinance might operate.

II.

CONSTITUTIONAL RIGHTS WERE NOT DENIED PETITIONERS IN STATE COURTS.

A. Constitutional Objections Raised by Motion to Strike the Complaint Were Properly Overruled by State Court.

The sole question in the instant case is whether the **state court erred** so as to deprive the petitioners of certain of their Constitutional rights. The petitioners filed extensive pleadings in the state court, stating in detail the Constitutional questions which they contended were at issue in the case. The pleadings in each case were similar, with one exception.[1] The overruling of all of the plead-

[1] No written motions to exclude the evidence were filed on behalf of William West, Roosevelt Westmoreland and Willie J. Willis.

ings filed by petitioners, by the trial court, constituted the first four of the five errors assigned by petitioners to the Alabama Court of Appeals (R. 56, 87, 123, 142, 177, 192, 219, 234, 261, 276). The fifth error assigned dealt with the admissibility of evidence and in no way dealt with a Constitutional question. As noted in the opinion of the lower court (see **Gober** case, R. 64, last paragraph), petitioners did not argue this assignment of error (5), and consideration of same was therefore pretermitted by the state court of appeals.

Petitioners' pleadings consisted of a motion to strike the complaint (R. 3, 74, 94, 130, 146, 184, 196, 226, 238, 268); demurrer (R. 4, 75, 95, 131, 147, 185, 197, 227, 239, 269); motion to exclude the evidence (R. 6, 77, 97, 133, 148, 199, 241) [no motion to exclude the evidence was filed on behalf of William West, Roosevelt Westmoreland and Willie J. Willis]; and motion for new trial (R. 12, 83, 103, 139, 154, 189, 205, 231, 247, 273).

The **motion to strike** contains six grounds, numbered 1 through 6, in support of the motion. The overruling of the motion was assigned as error 1 by petitioners on appeal in the state court. Grounds 3, 4 and 5 are the only grounds which endeavored to raise Constitutional points. Ground 3 says, in substance, that the **trespass after warning ordinance** of the City of Birmingham is "an abridgement of the freedom of assembly, speech and liberties * * * ."

Foregoing, for the moment the fact that a **motion to strike** is not a proper method of testing the validity or legal sufficiency of the City's complaint, **Taylor v. City of Birmingham**, 35 Ala. App. 133, 45 So. 2d 53; **Byrum v. Pharo**, 240 Ala. 561, 200 So. 622, the Constitutional point raised is hardly well taken.

This Court, in **Butler v. Pennsylvania**, 10 Howard 402, 414, 13 L. Ed. 472, stated, "Accordingly it has been repeat-

edly said by this court that to pronounce a law of one of the sovereign states of this union to be a violation of the constitution is a solemn function, demanding the gravest and most deliberate consideration; and that a law of one of the states should never be denominated if it can upon any other principle be correctly explained."

Since the Fourteenth Amendment protects one in his ownership of property, it hardly seems consistent for petitioners to argue that a state or a municipal body politic is doing an unconstitutional act when it affords one a local remedy for the protection of his property. Petitioners' argument that the trespass ordinance violates free speech protection afforded by the Fourteenth Amendment would strike down all laws having to do with holding one for ransom, extortion, blackmail, bad checks, plus an abundance of other offenses. Their argument as to free assembly, if sustained, would make lawful all riots, all conspiracies to commit a crime, and all crimes committed wherein more than one person participates, since each requires an assembly of persons. Such a contention as urged here by petitioners could well lead to endless absurdities as well as a condition of complete chaos.

Ground 4 of the motion to strike contends that the trespass ordinance "as applied to the defendant, constitutes an abridgement of privileges and immunities guaranteed defendant" in violation of the Fourteenth Amendment.

The motion to strike does not specify the "privileges and immunities" contemplated, and respondent does not deem it appropriate to enter upon conjecture on the subject.

Ground No. 5 of the motion to strike asserts that **Section 824** of respondent's code "as applied to this defendant, a Negro citizen of the United States, constitutes a

denial of due process and equal protection of the law" in violation of the Fourteenth Amendment. **Section 824** of the City Code deals with aiding, abetting or inciting another to violate a law or ordinance of the City, and is in no way involved in the instant case involving trespass.

B. **Demurrers Filed by Petitioners Were Properly Overruled in State Court.**

Petitioners filed a similar demurrer in each case, each containing eight grounds. The demurrer in each case was overruled and the overruling of same was assigned as error 2 in each case on appeal to the Alabama Court of Appeals (see Gober, R. 56).

Only grounds numbered 4, 5, 6, 7 and 8 endeavored to raise federal Constitutional questions.

Ground 4 of the demurrers says, in substance, that the trespass ordinance "as applied to this defendant is invalid" and violates the First and Fourteenth Amendments to the Constitution of the United States; ground 5 says the same ordinance "as applied to this defendant" deprived petitioner of free speech and free assembly. These grounds raise the identical points raised by petitioners' motion to strike the complaint in grounds 3 and 4 respectively, which have already been discussed, except that in demurrers petitioners say that the trespass ordinance is defective "as applied to this defendant."

It necessarily follows that since the ordinance did not show on its face its unconstitutional effect, if any, upon "**this** defendant", the demurrer became a speaking demurrer, and thereby due to be overruled by the trial court. **Brown v. City of Fairhope**, 265 Ala. 596, 93 So. 2d 419; **Kalas v. McMahon**, 36 Ala. App. 238, 54 So. 2d 322; **United States Fidelity and Guaranty Co. v. Town of Dothan**, 174 Ala. 480, 56 So. 953.

Ground 6 of the demurrers says the ordinance set forth in the City's complaint "as applied to this defendant" deprived him of due process because "* * * it is so vague * * *"; ground 7 of the demurrers urges that "as applied to this defendant" the ordinance is an abridgement of privileges and immunities protected by the Fourteenth Amendment. Neither ground 6 nor 7, or any other ground of the demurrers for that matter, purported to enlighten the court as to how the ordinance on its face deprived petitioners of their Constitutional guaranties. Ground 8 asserted that the trespass ordinance denied equal protection "as applied to this defendant", and was due to be overruled as a speaking demurrer.

By way of summary, the Constitutional defects in the trespass ordinance are asserted to be that the ordinance "violates" the Fourteenth Amendment (ground 4); that it abridges free speech and assembly (ground 5); that the ordinance is unconstitutionally vague (ground 6); that it constitutes an "abridgement of privileges and immunities" (ground 7); and that the ordinance deprives the defendant of due process (ground 8).

The **Code of Alabama 1940**, Section 236 of Title 7, states that, "No demurrer in pleading can be allowed except as to matters of substance, which the party demurring **specifies** (emphasis supplied); and no objection can be taken or allowed which is not distinctly stated in the demurrer." The foregoing code section has been uniformly held to be one "designed to prevent vague and indefinite grounds of demurrer". "The Supreme Court has long maintained and enforced a very strict observance of the rule announced in this section." **Deslandes v. Scales**, 187 Ala. 25, 28, 65 So. 393; **Union Central Life Insurance Co. v. Griffin**, 232 Ala. 254, 167 So. 321; **Southern Indemnity Ass'n v. Hoffman**, 16 Ala. App. 274, 77 So. 224.

State v. Howze, 247 Ala. 564, 25 So. 2d 433, states that "this (Code) section does away with a general demurrer at law."

The demurrers make not the slightest pretense at revealing how the ordinance in question denied Constitutional guaranties to the petitioners. Notwithstanding that general demurrers are not sustainable under Alabama law, it is difficult to appreciate petitioners' theory that one may use the premises of another as an arena for a public pronouncement of his cause, over the protest of the owner. The trespass ordinance is in no way concerned with the right to assemble or to speak freely, any more so than are laws that punish riots and unlawful conspiracies. Likewise, nothing **on the face of the ordinance** tends in any manner to indicate that one accused of its violation will be deprived of due process or equal protection. If such be a fact, petitioners did not see fit to specify the **matter of substance** in the ordinance which deprived them of their Constitutional guaranties as required by **Title 7, Section 236, Code of Alabama, 1940.**

C. **Constitutional Objections Raised by Motion to Exclude Evidence Were Properly Overruled by State Court.**

Following the overruling by the trial court of petitioners' demurrers in each case, evidence was heard, and upon the completion of same petitioner filed similar written motions to exclude the evidence (see Gober, R. 6) in each case except that of William West, Roosevelt Westmoreland and Willie J. Willis. The motions were overruled in each of the cases filed, and the overruling of same was assigned as error to the state appellate court as ground 3.

Of course, the first question to be determined is whether a **motion to exclude the evidence** is reviewable on appeal to the Alabama Appellate Court.

"It is well settled that the rules and principles of the law of evidence applicable to civil proceedings are applicable to **quasi criminal proceedings.**" **Ex Parte Messer**, 228 Ala. 143, 152 So. 244, 245; **Smith v. State**, 13 Ala. App. 411, 69 So. 406.

It is uniformly held in Alabama that "an appeal from a conviction for violation of a city ordinance is **quasi criminal**, and subject to the rules governing civil appeals. **Fiorella v. City of Birmingham**, 35 Ala. App. 384, 48 So. 2d 764; **cert. den.**, 254 Ala. 515, 48 So. 2d 768; **cert den.**, 71 S. Ct. 506, 340 U. S. 942, 95 L. Ed. 680; **Ellis v. City of Sylacauga**, 36 Ala. App. 687, 63 So. 2d 3[illegible]; **Jackson v. City of Mobile**, 33 Ala. App. 95, 30 So. 2d 40[illegible].

It has also been uniformly ruled in Alabama that "In civil cases, such a motion (to exclude the evidence) has been condemned by this Court in so many cases here decided that we deem it unnecessary to collate same. The trial court will not be reversed for refusing such a motion." **Snow v. Allen**, 227 Ala. 615, 151 So. 468; **Dorough v. Alabama Great So. R. Co.**, 222 Ala. 305, 128 So. 602. Motion for the **affirmative charge** is the "proper method and the motion to exclude the evidence * * * is inappropriate in a civil case as this court has held many times". **Mazer v. Brown**, 259 Ala. 449, 66 So. 2d 561, 565.

It cannot but be apparent from the foregoing decisions that on appeal from the City's Recorders Court to the Circuit Court the sit-down cases were **quasi-criminal**; that they were subject to **civil rules** as distinguished from criminal rules; and, a motion to exclude the evidence is not the proper method to attack the evidence, but, to the contrary, a motion for the **affirmative charge** is the only means by which the evidence or lack of evidence may be impugned on appeal to the state's appellate courts.

Your respondent feels it worthy of this Court's attention to note that the so-called "motion(s) to exclude the

evidence" are not in fact what their title would indicate. They do not move the court to afford petitioners any relief whatever; they seek no action or remedy from the court. They contain simply a documentation of supposed law and fact, and never once suggest that the evidence is not sufficient to sustain the verdict, assuming, for the sake of argument, these to be proper cases for the filing of such a motion.

Assuming for the moment that a motion to exclude the evidence has not been condemned in so many Alabama decisions that the Alabama Supreme Court "deem(s) it unnecessary to collate same", what, if any, merit is found in the motion?

The first ground attacks the "complaint" (see **Gober**, R. 6), **and not the evidence**, by stating the complaint "is invalid" (ibid). Only a demurrer could serve this function.

Ground 2 asserts substantially that the evidence offered against the defendant established that defendant was "in peaceful exercise of Constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in Pizitz"[2] (R. 7).

The petitioners contend in this ground that they may assemble upon the premises of another over his protest for purposes of making known their dislike of the owner's racial policy. Your respondent sees little legal merit in the fact that the property owner's racial policy may be the subject of petitioners' distaste. While the subject of racial discrimination in many areas has great emotional appeal, your respondent does not feel that a cause with

[2] In the motion to exclude the evidence in the Gober case (R. 6, 7, 8), "Pizitz" department store is charged with exercising racially discriminatory practices. The names of the different stores involved are substituted in the remaining cases.

considerable appeal justifies a trespass any more than one with little or no appeal. As was pointed out by Mr. Justice Harlan, in **Garner v. Louisiana**, 368 U. S. 157, "This is not to say, of course, that the Fourteenth Amendment reaches to demonstrations conducted on private property over the objection of the owner (as in **Briscoe**) just as it would not encompass verbal expression in a private home if the owner has not consented."

However, notwithstanding the merits or demerits of the foregoing proposition, this ground of the motion to exclude the evidence in no way attacks the sufficiency of the evidence, nor does it relate to any matter defined within the pleadings of the instant case.

Ground 3 of the motion to exclude the evidence, in brief, states that the defendant and others sought to protest "in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in Birmingham, Alabama to permit defendant, a Negro", to enjoy access to said stores as afforded members of other races; also, that prosecuting witnesses and arresting officers were attempting to enforce this discriminatory policy of the stores (R. 7).

It must be remembered that petitioners filed no special plea to the complaint filed by the City. The **Alabama Code of 1940, Title 7, Section 225**, says, in part, as follows: "The defendant may plead more pleas than one without unnecessary repetition; and, if he does not rely solely on a denial of the plaintiff's cause of action, **must plead specially the matter of defense**" (Emphasis supplied). A search of the record will reveal that **no plea** was filed by petitioners setting forth any matter of defense as permitted by the foregoing section of the state code. The issue, in each case, **in the absence of a plea**, became a simple denial. Petitioners, for reasons best known to them, elected not to have the issues framed along the line of

state action or other Constitutional grounds now urged before this Court. State action, not being an issue defined by the pleadings in the case, could not be a proper ground upon which to attack the **sufficiency of the evidence** either in a motion for the affirmative charge, or a motion to exclude the evidence when filed under appropriate circumstances. It is **fundamental** that the issues to be tried by a court are those which the pleadings leave in dispute. As noted in **Mitchell v. Wright**, C. C. A. Ala., 154 Fed. 2d 924, 926, 927; **cert. den.**, 67 S. Ct. 96, 329 U. S. 733, 91 L. Ed. 633, the court stated, "The office of pleading is to inform the court and the parties of the facts in issue; the court, that it may declare the law; and the parties, that they may know what to meet by their proof." This principle is laid down in keeping with the decision of this Court in **Hill v. Mendenhall**, 21 Wall. 453, 88 U. S. 453, 22 L. Ed. 616.

In the instant cases the only issue in dispute before the trial court was whether or not the defendant below had committed the act charged in the complaint. After the evidence was fully presented, there still was no other issue before the court. The plaintiff under the state of pleadings in the trial court, could not conceivably have been called upon to anticipate and negative by proof all of the matters which defendants below might **subsequently** raise in the nature of a defense to the complaint charged. Petitioners had every opportunity to formulate the issues to be tried. This privilege was exclusively theirs and it must be assumed they exercised it after due deliberation. Petitioners were represented by five able counsel who were particularly expert in matters akin to those in the instant cases. If their choice of issues was unwise, and it is not suggested that it was, the responsibility can hardly be laid upon the state court.

In any event, the respondent claims no responsibility for the discriminatory practices of the "preponderant

number of stores * * *" (R. 7) situated in its City; nor, was the City required (or prepared) under the pleadings to substantiate by affirmative evidence that this was true or that the action of its police officers was in response to information received by telephone or otherwise, from persons witnessing the offenses.

Ground 4 of the motion to exclude the evidence (R. 7, 8), similarly to most other grounds set forth in same, reiterates that the complaint filed by respondent charges the defendant with "trespass upon land after being forbidden to enter", and neglects to note that the **trespass after warning** feature of the ordinance is the gravamen of the offense, as a most casual review of the record will reveal. What is hoped to be gained by petitioners in this respect is not known, but your respondent deems it useful to note.

This ground (R. 7, 8), as many others likewise do, points out that "Pizitz" had a "racially discriminatory practice", and that "under color of law" the defendant was arrested "to enforce this racially discrimmatory policy" in violation of the Fourteenth Amendment.

Whether Pizitz had a right to consider racial involvements in its policy has been previously decided affirmatively in **Browder v. Gayle**, 142 F. Supp. 707; and in **Williams v. Howard Johnson**, 268 F. 2d 845, unless it be established that the eating facility was one engaged in interstate commerce.

As to the proposition of the City acting under "color of law", it appears to your respondent that Section 1436 of respondent's Code has not been shown by the record to be other than a duly adopted law of the respondent city.

As to the proposition that the arrest was made to assist Pizitz in its racial policy, from aught that appears in the

record in these cases the respondent endeavors to enforce its trespass ordinance whether or not it may in some instances coincide with the policy of certain stores.

Ground 5 of the motion (R. 8) states that the trespass ordinance "is unconstitutional on its face by making it a crime to be on **public property** (emphasis supplied) after being asked to leave" at the whim of some individual "in that said statute does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise defendant of the validity of the demand to leave * * *."

Respondent suspects that petitioners are aware that the record is barren of any evidence that the stores involved were property belonging to the "public".

It needs not repeating that an attack upon what appears on the face of the ordinance, should properly be served by appropriate demurrer addressed to the complaint.

It would appear that the only "document" which might meet petitioners' criterion for sufficiently apprising a trespasser of a valid demand to leave would be an abstract of title to the land involved, in addition to a copy of the contract between the owner or lessee of the property and his agents or officials. Your respondent feels that this is a matter properly lying within the discretion of the legislative body enacting the ordinance. In **Standard Oil Co. v. City of Marysville**, Kan., 279 U. S. 582, rehearing denied, 282 U. S. 797, this Court stated: "Where legislative action is within scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision."

It might well be argued, if a person other than an agent or official of the store involved had in fact made the re-

que t to leave, that the ordinance had not been violated; but petitioners make no such contention, and this, presumably, because in each case the evidence was clear that an official of the store, and not some stranger with a "whim", made the request.

Ground 6 of the motion simply states that the trespass ordinance (Section 1436) is unconstitutional because "it makes it a crime to be on property open to the public after being asked to leave, because of race or color."

The state appellate court's opinion (R. 64) states, "It is fundamental, and requires no citation of authority, that the grantor of a license, which has not become coupled with an interest, may revoke the license at will"; also, "As stated in Martin v. Struthers, 319 U. S. 147, 63 S. Ct. 862, 87 L. Ed. 1313: 'Traditionally the American law punishes persons who enter onto the property of another after having been warned to keep off.'"

The state appellate court cited **Browder v. Gayle**, 142 F. Supp. 707, wherein the court said with reference to the right of one to decide with whom he wished to do business, "Indeed we think that such liberty is guaranteed by the due process of that (14th) Amendment."

Are not the petitioners now saying that the shoe has shifted to the other foot? Are they not saying that property owners have a choice of electing **to do business** with members of the Negro race, but that property owners have no right to elect **not to do business** with them? Petitioners' position on the subject is simply that if the property owners' election meets petitioners' approval, the election is valid under the Constitution; but if the election of the property owners meets with their disapproval, then it becomes an abuse of the Constitution.

Petitioners go further and say, in substance, that property owners cannot do some business with them and then

elect to refrain from doing other business with them. Your respondent urges that this entire matter is just that simple. Petitioners say deal with us all the way or not at all. Of course, petitioners may conduct their economic affairs in this fashion if they see fit to do so, and in fact are at the present time to a great extent doing exactly that in the respondent city. The Fourteenth Amendment requires that they have this liberty, but by the same token the business owner is entitled to the free exercise of the same choice, or any modification of same, he desires. To contend, as do petitioners, that his business is in a public place, can in no way take away his Constitutional guaranties, though it is not exactly clear to respondent what petitioners mean by the term "public place". Certainly it is not public property as petitioners have earlier asserted; at least the record nowhere reveals that the public purchased or paid for the property, or claims any right of control over it, **other than routine police powers and the exaction of taxes** through various forms.

Based upon **Browder v. Gayle**, supra, **Williams v. Howard Johnson**, supra, and freedom of the right to contract protected by the Fifth and Fourteenth Amendments to the Constitution, your respondent submits that the store owners could contract with petitioners on whatever basis was conductive to the culmination of an accord between the two of them.

Ground 7 of the motion to exclude the evidence (R. 8) says that defendant was a member of the public attempting to use "a **publicly owned facility** (emphasis supplied), to-wit: Pizitz * * *"; "that such denial was in accordance with a policy, custom and usage of **Pizitz** (emphasis supplied) of operating such facilities and services on a racially segregated basis, which policy, custom and usage violates the due process and equal protection clauses * * *"

Petitioners repeat in this ground of their motion to exclude the evidence, as they have done over and over, that their denial of Constitutional protection "**was in accordance with a policy, custom and usage of Pizitz**" (emphasis supplied), or such other store as might be involved in each of the respective cases here.

The Fourteenth Amendment bars **state action**, not "**Pizitz**" **action**, nor privately owned store action. It is, by the repeated assertion of counsel for petitioners in the state court, the **policy and custom of the stores** that have offended them. Under the state of the pleadings before the state court and the evidence adduced, plus the repeated admission of counsel for petitioners that it was Pizitz' custom or policy, or that of other stores, which denied petitioners their Constitutional rights, was there anything in the record before the state court which made it mandatory upon it to conclude that **state action** was the compelling force in the enforcement of the City's ordinance?

The sole reference to state action prior to completing the evidence in each of the cases, occurred in the **Gober** and **Davis** cases. Counsel for James Gober and James Albert Davis, in cross-examining an employee of Pizitz who had previously testified (R. 24) that Mr. Pizitz, in addressing the two defendants, had "used the term 'we cannot serve you here,'" asked the employee if he "assume(d) that he meant it was against the law." The employee answered, "I **assumed** (emphasis supplied) that" (ibid). Then counsel for defendants asked if the witness knew "of his own knowledge that there is such a regulation of the City of Birmingham." Whereupon, counsel for the City objected (ibid). The court inquired, "Would any witness' knowledge of the law be material?" (ibid). Counsel for the two defendants then informed the court that "our theory of this case (is) it is one based simply

on the segregation ordinance * * *" (ibid), and subsequently remarked that from the witness' answer, "It seems it is predicated on the segregation ordinance of the City of Birmingham rather than on the trespass" (R. 25). Then counsel for the two defendants addressed the court as follows: "If your honor pleases, may I say this. We are not arguing with the court. What I say (is) unless Mr. Pizitz had ordered these men out of the restaurant facilities they would not have been arrested and could not have been under the statute" (R. 25). At this point the record reads:

> "The Court: Is there any divergence between you and the City on that theory?
>
> Mr. Hall: I don't know, sir.
>
> The Court: Unless they failed to comply with some trespass, some trespass after warning. Isn't that what it is?
>
> Mr. Hall: I suppose so.
>
> The Court: Is that the issue. Is that the thing which is germane?
>
> Mr. Hall: It certainly is, your Honor" (R. 25, 26).

The trial court ruled again upon another question to the same witness regarding his being aware of a segregation ordinance, saying, "I don't believe the witness' knowledge of the law is competent"; and counsel withdrew the question (R. 26).

What provisions the ordinance contained was not put in the record; no effort was made on the part of counsel to identify the ordinance he had in mind; counsel for petitioners had not made an issue of the ordinance by any pleading; he did not seek to introduce a copy of the ordinance in evidence; he did not ask the court to take judicial notice of whatever ordinance he had in mind. The trial court would have been remiss had it permitted a witness

to testify as to whether he was familiar with some city ordinance or had knowledge on the subject.

20 Am. Jur., Sec. 799, supported by abundant citation of authority, states: "It may be laid down as a general rule that a witness is never permitted to give his opinion on a question of law or upon matters which involve a question of law. This rule is applicable to both expert and non-expert witnesses." See, also, **Alabama v. Adams, Rowe & Norman**, 216 Ala. 403, 113 So. 265; **Fionella v. City of Birmingham**, 35 Ala. App. 384, 48 So. 2d 764; **cert. den.**, 254 Ala. 515, 48 So. 2d 768, **cert. den.**, 340 U. S. 942.

Respondent submits that the effort of petitioners in the **Gober** and **Davis** cases to elicit information from an employee of a store concerning some unidentified ordinance, without reserving an exception to the trial court's sustaining objection to same, plus brief comment of counsel about a theory based upon same, falls considerably short of having properly made out a case of "state action" which deprived these two petitioners of their privileges under the Federal Constitution.

Ground 8 of the motion to exclude the evidence (R. 9) says in essence that if Pizitz and other like facilities were to cease doing business, its services "would have to be provided by the state", and therefore Pizitz may not segregate its store.

The only fault your respondent finds with this proposition is that Pizitz is presently providing its services and the state, as yet, is not. Until such time as the state takes over, the store is **privately owned** and **privately operated.**

D. State Court Did Not Commit Error in Overruling Motion for New Trial to the Denial of Petitioners' Constitutional Rights.

Similar motions for new trials were filed in each of the sit-down cases here involved. Their overruling by the

trial court was incorporated as ground 4 in the assignment of error filed in the Alabama Court of Appeals (see Gober case, R. 56).

The great majority of the grounds assigned had no relationship to Constitutional questions, and those that did have such relationship have already been discussed at some length.

As noted in the opinion of the state court of appeals (R. 61), "Assignments of Error Numbers 3 and 4, respectively, are to the effect that the lower court erred in overruling appellant's motion to exclude the evidence, and in overruling appellant's motion for a new trial. Counsel has made no attempt to separate these assignments for argument in brief, and we will treat them jointly, though we wish to observe that the grounds supporting the motion to exclude the evidence are faulty in several aspects, particularly in setting forth erroneous legal principles as their bases. All grounds specified in the motion were defective, and the court properly overruled the motion." The opinion made no further reference to the motion for new trial, but proceeded to discuss certain arguments made in appellant's brief which the court held to be erroneous (R. 61, 62, 63, 64).

The above mentioned statement of the state appellate court had obvious reference to **Rules of Practice in Supreme Court, Rule 9 (20), Alabama Code, 1940, Title 7, Appendix**, relating to the argument in brief of appellant, of each error assigned. The foregoing Supreme Court Rule has been construed many times. **American Surety Co. v. Hooker**, 36 Ala. App. 39, 58 So. 2d 462, and **Wyatt v. Birmingham**, 37 Ala. App. 579, 72 So. 2d 735, both assert: "Where assignments of error are argued in groups in appellant's brief, if any one of said assignments is without merit a review of the others will be pretermitted."

The net effect of this part of the appellate court's opinion is that since the motion to exclude the evidence was based upon "erroneous legal principles" (R. 61), the Court would, under its Rule 9 (10), not consider the motion for the new trial which was assigned as error number 4.

By the petitioners' election not to argue assignments of error number 3 and number 4 separately, petitioners based their hope of reversing the lower court upon the joint validity of both propositions assigned. The adverse finding of the appellate court as to error number 3 rendered unnecessary any consideration as to error number 4,[3] under authority of **American Surety Co. v. Hooker**, supra, and **Wyatt v. Birmingham**, supra.

III.

FOURTEENTH AMENDMENT NOT INVOLVED IN THIS CONTROVERSY.

Each of the sit down cases were tried under similar complaints, except for the names of the defendants and the respective stores involved (see **Gober**, R. 2, 3), which complaints charged that the defendant "did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as (name of store), located at (address), after being warned not to do so * * *".

Lengthy identical demurrers were filed (see **Gober**, R. 4, 5, 6), preceded by identical motions to strike (see **Gober**, R. 3, 4).

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[3] Assignment of error number 5 was not argued at all in appellants' brief. See opinion of Alabama Court of Appeals (R. 64); court "pretermit(ed) consideration thereof", under authority of Supreme Court Rule 9 (10), (d).

None of the demurrers was sustained, as has been earlier noted. No ground of the demurrers properly charged any defect **apparent upon the face** of the complaint so as to afford plaintiff an occasion to **amend same** if need be. As noted by the Alabama Court of Appeals (R. 60), "it is clear that all of the grounds (of the demurrers) are general in nature, and in no wise point out any specific defect in the complaint".

The motion to strike was held inapplicable by the appellate court, with authority cited (R. 60).

The cases proceeded to trial on the question of whether or not the offense charged in the complaints had been committed by petitioners.

Petitioners in their brief before this Court now contend for the first time, that a segregation ordinance is involved in each case (p. 18); that a state segregation policy is involved (p. 23); that state enforcement of private racial discrimination is involved (p. 25). As noted herein earlier, after the completion of each of the trials below, the petitioners filed motions to exclude the evidence, contending in some half of their grounds that the **individual stores** practiced a usage and policy of segregation (R. 7, 8), and that because the stores were either publicly owned (see **Gober**, R. 8), or performing a public function (R. 9), the stores could not segregate their facilities. Before this Court their position changes from the theory that the stores are publicly owned, to that of being subjugated by state policy.

The respondent feels that it is not committed by the Court's rules to the task of defending all of the inconsistent positions of petitioners which were not properly placed in issue before the trial court.

As noted in the case of **Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Mis-**

souri, 361 U. S. 363, "Constitutional questions will not be dealt with abstractly. * * * They will be dealt with only as they are **appropriately raised** (emphasis supplied) upon a record before us. * * * Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress."

For the purpose of correcting the record alone, your respondent notes that petitioners' brief (pp. 25, 26) contains the following: "But in every case, the City introduced evidence to prove that petitioners were asked by some employee of the store to leave the **dining area reserved for white customers** (emphasis supplied) (R. 21, 115, 162, 211, 252-253)." Your respondent has carefully reviewed each of the foregoing numbered pages of the Record and fails to find one mention of a "dining area reserved for white customers". The Court's review of same is invited. It will possibly be of some aid to the Court to note, however, that petitioners concede that in each case a store employee asked the defendants to leave the dining area.

Petitioners argue in their brief (pp. 44-47) that free speech is involved and make reference to the opinion of Mr. Justice Harlan, in **Garner,** supra, that sit-downs are a part of "free trade in ideas." Mr. Justice Harlan, in the foregoing opinion, affirmed also, "This is not to say, of course, that the Fourteenth Amendment reaches to demonstrations conducted on private property over the objection of the owner (as in Briscoe) just as it would not encompass verbal expression in a private home if the owner has not consented."

For one reason or another, it appears that if a **demonstration** is involved, the case for free speech becomes stronger. Whatever may be the significance of the word **demonstration,** the facts in these cases do not indicate to

your respondent that demonstrations were involved in these cases.

According to the record, certain things were common in each of the cases. None of the petitioners carried placards or handbills. None of the petitioners made or attempted to make speeches. No one resisted arrest in any manner so as to attract attention. None of the usual fanfare of photographers and newspaper people were in attendance as is customary for demonstrations. One of the petitioners (R. 21) suggested that the police be called; indicating that his extended presence on the premises was not of importance. One of the petitioners stated the nature of his business was to "shop", and that he purchased socks, toothpaste, and a handkerchief (R. 43). He stated further he was there for "a snack" (R. 49). Another of the petitioners (R. 170) stated he purchased comic books and paper. He further testified (*ibid*) that he said to Parker, "Let's go over here and get something to eat."

The only inference your respondent can fairly draw from the behavior of the petitioners in the stores is that their mission was to **provoke an arrest** and not to stage anything in the nature of a demonstration. The fact that only two students were involved in each store lends further credence to this conclusion. Under the facts as presented in the record, it would appear that the petitioners were accorded everything they sought in each of the stores, and that their right to **precipitate litigation** was in no way impeded nor denied them, but quite to the contrary. It must be assumed, and it is not denied, that the plans of the petitioners proceeded as they expected them to.

It is difficult for your respondent to see wherein the matter of free speech was in any way involved in the incidents which took place in the various stores. Assuming, however, that your respondent is in error in this regard, this Court's recent expression through Mr. Justice

Harlan, in **Garner**, supra, would deny petitioners Fourteenth Amendment protection while demonstrating on the private property of another after being told to leave.

CONCLUSION.

Wherefore, for the foregoing reasons, it is respectfully submitted that the conviction of the petitioners below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States.

October Term, 1962.

James Gober et al., Petitioners,
vs.
City of Birmingham, Respondent.
No. 66.

Certificate of Service.

I, Earl McBee, one of the Attorneys for Respondent, City of Birmingham, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the

16th day of October, 1962, I served a copy of Brief for Respondent in the above-styled and numbered cause on Jack Greenberg and on Constance Baker Motley, Attorneys for Petitioners, by depositing same in a United States Post Office or mail box, with air-mail postage prepaid, addressed to them at their post office address, namely, 10 Columbus Circle, New York 19, New York, and on the following respective Attorneys of Record for Petitioners, whose addresses are known to Respondent, by depositing the same in a United States Post Office or mail box, with first-class postage prepaid, addressed to Arthur D. Shores, 1527 5th Avenue North, Birmingham, Alabama; Orzell Billingsley, Jr., 1630 4th Avenue North, Birmingham, Alabama; Peter A. Hall, Masonic Temple Building, Birmingham, Alabama; Oscar W. Adams, Jr., 1630 4th Avenue North, Birmingham, Alabama, and J. Richmond Pearson, 415 North 16th Street, Birmingham, Alabama.

Earl McBee

Earl McBee,
Attorney for Respondent.